WISMA MCA SDN. BHD.

v.

WILSON PARKING (MALAYSIA) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[SUIT NO. D2-22-2-94]
12 JULY 1994

PRACTICE & PROCEDURE: Application for injunction by parties against the other - Dispute on extension of car park lease agreement - Plaintiff giving notice to deliver vacant possession - Defendant refusing to vacate - Where the balance of convenience lies.

CONTRACT: Car park lease agreement - Defendant making written request for extension of lease - Revised terms agreed upon subject to approval of board of directors - Delay in convening board meeting - Defendant allowed to operate car park on monthly basis - Plaintiff giving defendant notice to deliver vacant possession - Defendant refusing to vacate - Whether lease agreement lawfully terminated by plaintiff - Whether plaintiff's refusal to renew lease reasonable.

An underground car park was leased by the plaintiff to the defendant pursuant to a car park lease agreement for a period of 3 years. Prior to its expiration the defendant made a written request for extension of the lease. Revised terms were agreed upon at a meeting subject to the approval of the board of directors. The defendant was subsequently notified of a delay in convening the board meeting but was allowed to operate the car park on a monthly basis. On 30 November 1993 the plaintiff informed the defendant that it would not be renewing the lease and gave the defendant one month's notice to deliver vacant possession of the car park which the defendant refused to do. Both parties applied for an injunction against the other.

The plaintiff claimed that as the lease agreement had not been validly renewed by the board of directors, the defendant's continued occupation of the car park after 1 January 1993 was as a licensee and as the licence had been validly terminated by the notice to quit, the defendant was a trespasser. The defendant questioned the legality of the termination on the ground that at the meeting only the renewed terms were agreed upon but not the requirement for approval by the plaintiff's board of directors. Furthermore, at a meeting on 6 September 1993 the defendant was reassured that renewal would be formalised as a matter of course which the defendant alleged constituted an oral agreement to renew.

Held:

[1] From the affidavit evidence it was clear that the only reason why the agreement was terminated was because the plaintiff had appointed a third party to take over the operation of the car park. Thus the plaintiff's refusal to renew the agreement was unreasonable, bearing in mind that no reason was given why the agreement was terminated.

[2] A number of serious issues had emerged, these being whether there was an oral agreement on renewal after 1 January 1993, whether the refusal to renew was made reasonably and whether the agreement had been lawfully terminated. In deciding in whose favour the injunction should lie, the balance of convenience favoured the defendant as it was still in occupation of the car park and maintaining the *status quo* was most relevant as whatever damages the successful party was entitled to at the hearing of the suit depended on the profits derived from the operation of the car park which figures only the defendant could come up with.

[Plaintiff's application dismissed with costs. Defendant's application allowed with costs].

For the plaintiff - Robert Lazar; M/s. Shearn Delamore & Co.
For the defendant - Romesh Abraham; M/s. Shook Lin & Bok

JUDGMENT

Siti Norma Bte Yaakob J:

Wisma MCA, an office complex situated at 163, Jalan Ampang, Kuala Lumpur, belongs to the plaintiff. The building consists of an underground car park which is leased by the plaintiff to the defendant pursuant to the terms and conditions contained in a car park lease agreement (the agreement) dated 24 May 1990, executed by them. Under clause 1 of the agreement, the defendant is given the right to manage, control and operate the car park for a period of 3 years commencing from 1 January 1990. Thus the lease expires on 31 December 1992.

Under clause 2 of the agreement, the plaintiff may, at its discretion, such discretion to be exercised reasonably, extend the duration of the lease for another 3 years at the written request of the defendant to be made 3 months before the expiry date.

Following a written request for extension dated 19 September 1992, a meeting was held between the parties on 26 November 1992, and the fact of this meeting and the revised terms that were agreed upon are documented by the plaintiff's letter dated 2 December 1992. The letter also went further to state that the renewal of the agreement based on the revised terms agreed to by the parties, is subject to the approval of the board of directors of the plaintiff and it is this very term which has now become the bone of contention between the parties.

A second letter from the plaintiff dated 16 December 1992, notified the defendant that because of time constraints, there may be a delay in the convening of the board meeting to consider the defendant's application to renew the agreement but pending such approval, the defendant was allowed to operate the car park on a month to month basis, pursuant to clause 8(c) of the agreement.

Acting on the plaintiff's two letters, the defendant continued to operate the car park until it received the plaintiff's letter dated 30 November 1993, wherein the plaintiff gave the defendant one month's notice that it will not be extending the agreement after 31 December 1993, and that the defendant must deliver vacant possession of the car park to the plaintiff on or before 1 January 1994.

The defendant refused to do so and in the instant proceedings before me, the plaintiff applies for an injunction to restrain the defendant from remaining or continuing to occupy the car park, and that it quit and deliver vacant possession to the plaintiff.

The defendant, on the other hand, has also filed a similar application to restrain the plaintiff from obstructing, preventing or otherwise interfering in any manner with the defendant's management, control and operation of the car park and from taking possession of the car park, as it questions the legality of the termination.

Both applications were fixed on the same day but since the real issue is centred on the termination of the defendant's occupation of the car park, submissions were geared towards establishing

(1) whether the plaintiff had lawfully terminated the agreement by its letter dated 30 November 1993, and
(2) whether an injunction should be against the plaintiff or the defendant.

It is the plaintiff's case that after 1 January 1993, the agreement had not been validly renewed, as no Board meeting was held to consider the defendant's application for extension. To that extent, the defendant's continued occupation of the car park after 1 January 1993, was that of a licensee for a successive period of 6 months as stipulated for under clause 8(c) of the agreement and that before the conclusion of the second six-month period, the plaintiff had given the one month's notice to quit dated 30 November 1993. Since the licence has been validly terminated, the defendant's continued presence on the premises after 1 January 1994, is that of a trespasser and the defendant has to move out. Alternatively, if the licence has been wrongly terminated, the defendant's remedy is only in damages.

The defendant questions the legality of the termination on the grounds that on 26 November 1992, when they had met to discuss the option to renew the agreement, only the renewed terms as enumerated in paragraphs 1 - 6 of the plaintiff's letter dated 2 December 1992, were agreed upon but not the requirement that approval for the renewal was subject to the plaintiff's board agreeing to that approval. The plaintiff's reply to that is that Mr. Low Kim Seng and Mr. P.T. Low, who represented the plaintiff at the meeting on 26 November 1992, had no authority to commit the plaintiff to renew the agreement and approval had still to be obtained from the board.

Mr. Low Kim Seng is a director of the plaintiff and in that capacity, I consider that his presence alone is sufficient reason for the defendant to assume that he had the authority to represent the plaintiff, including the authority to grant approval to the renewal. In this respect, he had not filed any affidavit to state otherwise.

In any event, there was another meeting held between the parties on 24 March 1993, where it was agreed that the defendant construct a second exit to the car park and the defendant did so at the cost of about RM15,000. If indeed the defendant's occupation of the car park was then on a month to month basis, I do not consider that the defendant would be prepared to spend a large sum of money to construct the second exit. The fact that it did strengthens the defendant's contention that it was already assured of a renewal subject only to the execution of a formal agreement. Then again there was a further meeting between the parties on 6 September 1993, when the defendant was reassured that renewal would be formalised as a matter of course. It is the defendant's allegation that although there was no formal renewal lease executed, there was in fact an oral agreement that the agreement would be renewed for another 3 years.

It is not disputed that the defendant exercised its option to renew the agreement and the exercise of this option created mutual rights and obligations between the parties. In this instance, has the plaintiff been reasonable when it refused to renew the lease? I answer this in the negative as

(1) the defendant had not breached any terms of the agreement.
(2) there was unreasonable delay on the part of the plaintiff to communicate the board's decision, as the request for renewal was made in September 1992 and the decision not to renew only communicated 14 months later, in November 1993.
(3) the plaintiff never gave a reason why the board refused renewal.

From the affidavit evidence, it is clear on the day the plaintiff notified the defendant that the agreement was to be terminated on 31 December 1993, it had also written to a third party, Metro Parking (M) Sdn. Bhd., appointing the latter as the new operator for the car park. The defendant was not made aware of this new appointment and this can only mean that the only reason why the agreement was terminated was because the plaintiff had appointed a third party to take over the operation of the car park. Clearly the plaintiff's refusal to renew the agreement is unreasonable, bearing in mind that no reason was given why the agreement was terminated on 31 December 1993.

Clearly on the affidavit evidence alone, a number of serious issues have emerged, these being

(1) whether there was an oral agreement on renewal after 1 January 1993.
(2) whether the refusal to renew was made reasonably or unreasonably.
(3) whether the agreement has been lawfully terminated.

In deciding in whose favour the injunction should lie, the balance of convenience favours the defendant, as it is still in occupation of the car park. Maintaining the *status quo* is most relevant in these proceedings, as whatever damages the successful party is entitled to at the hearing of this suit must depend on the profits derived from the operation of the car park. Only the defendant is able to come up with the figures and on that finding, I had dismissed the plaintiff's application with costs and allowed with costs the defendant's application for an injunction in terms of prayers 1(a) - (c) of its application.